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E. ROBERT SEAVER,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 362

VINCENT FRANCIS McGEE, JR.,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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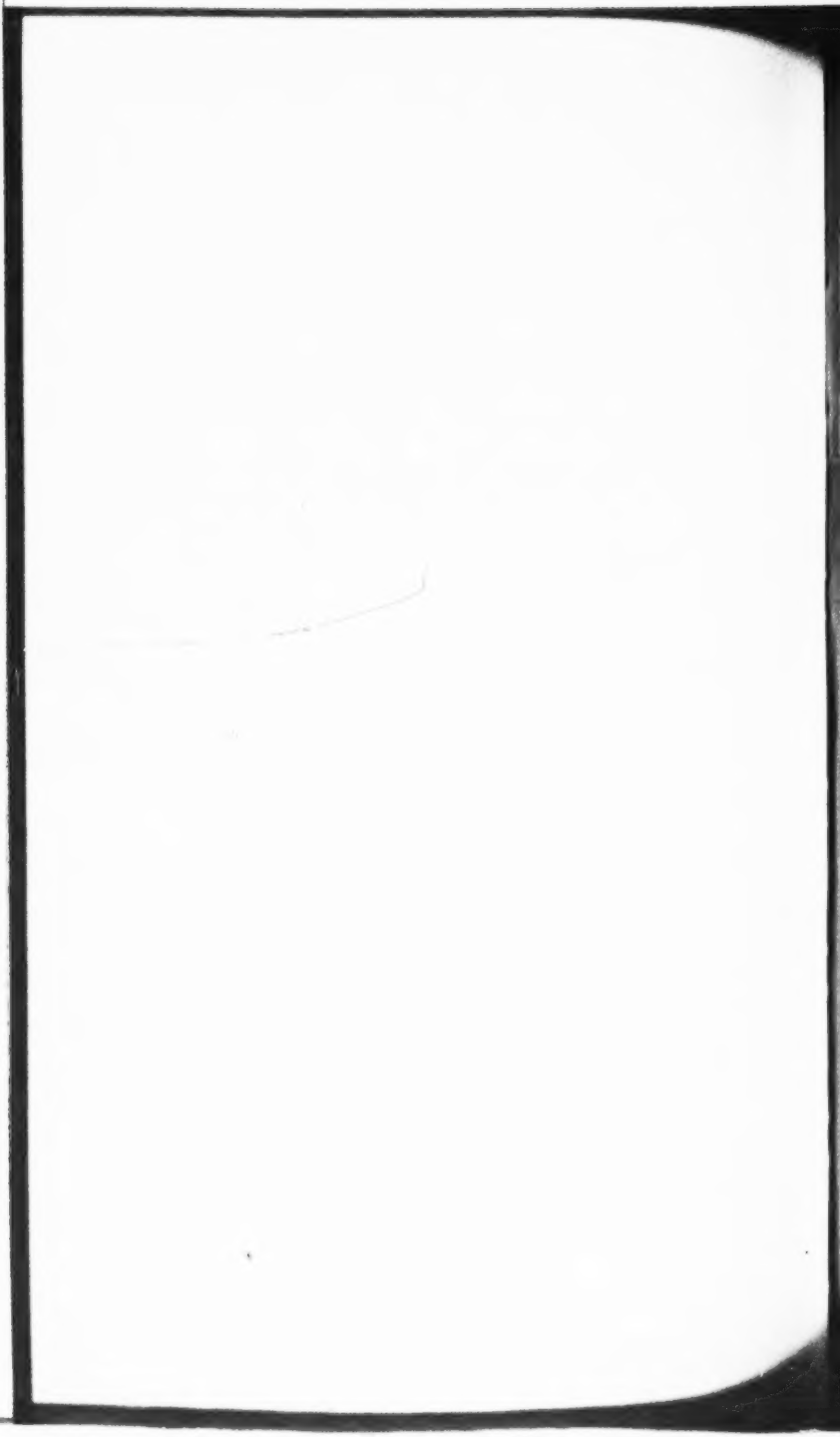

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Opinion Below

The opinion of the Court of Appeals is reported at 426 F.2d 691 and is set out in the Appendix at A. 61. The dissenting opinion of Circuit Judge Feinberg is reported at 426 F.2d at 700 and appears in the Appendix at A. 79.

Jurisdiction

The judgment of the Court of Appeals was entered on March 31, 1970 (A. 90-91). On May 7, 1970, the Court of Appeals denied petitioner's motion for rehearing or rehearing *in banc* (A. 92-93). On June 1, 1970, Mr. Justice Harlan

issued an order extending the time within which to file a petition for writ of certiorari to July 6, 1970. The petition for certiorari was filed on July 6, 1970 and certiorari was granted on October 19, 1970 (A. 94). The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Statutes and Regulations Involved

MILITARY SELECTIVE SERVICE ACT OF 1967, 50 U.S.C. APP.

Section 456(g) Regular or duly ordained ministers of religion . . . and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools . . . shall be exempt from training and service (but not from registration) under this title. . . .

Section 456(j) *Conscientious objectors.*—Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.

Section 460(b)(3). No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal

boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

Section 462 *Penalties.*—(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . .

SELECTIVE SERVICE REGULATIONS

32 C.F.R.

§1622.1 . . .

(c) . . . . The local board will receive and consider all information, pertinent to the classification of a registrant, presented to it. The mailing by the local board of a Classification Questionnaire (SSS Form No. 100) to the latest address furnished by a registrant shall be notice to the registrant that unless information is presented to the local

board, within the time specified for the return of the questionnaire, which will justify his deferment or exemption from military service the registrant will be classified in Class I-A.

§1622.10 . . .

In Class I-A shall be placed every registrant who has failed to establish to the satisfaction of the local board, subject to appeal hereinafter provided, that he is eligible for classification in another class.

§1622.25 . . .

(a) In Class II-S shall be placed any registrant who has requested such deferment. . . .

§1622.43 . . .

(a) In Class IV-D shall be placed any registrant . . .

(3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school. . . .

§1623.1 . . .

(b) The registrant's classification shall be determined solely on the basis of the official forms of the Selective Service System and such other written information as may be contained in his file; provided, that the local board shall proceed with the registrant's classification and classify him whenever (1) he fails to return his Classification Questionnaire (SSS Form No. 100) within the time allowed by §1621.10 of this chapter, or (2) he fails to provide

the local board with any other information concerning his status which he is requested or required to furnish. . . .

§1623.2 . . .

Every registrant shall be placed in Class I-A under the provisions of section 1622.10 of this chapter except that when grounds are established to place a registrant in one or more of the classes listed in the following table, the registrant shall be classified in the lowest class for which he is determined to be eligible. . . .

§1623.5 . . .

Every person who has been classified by a local board must have in his personal possession at all times, in addition to his Registration Certificate (SSS Form No. 2), a valid Notice of Classification (SSS Form No. 110) issued to him showing his current classification. . . .

§1628.11 . . .

(b) . . . the local board shall mail an Order to Report for Armed Forces Physical Examination (SSS Form No. 223) to registrants who have been classified in Class I-A, Class I-A-O, and Class I-O. . . .

(c) The local board may also mail an Order to Report for Armed Forces Physical Examination (SSS Form No. 223) to any registrant who is classified in a class other than Class I-A, Class I-A-O, or Class I-O if it determines that his induction may shortly occur. . . .

§1641.2 . . .

(b) If a registrant or any other person concerned fails to claim and exercise any right or privilege within the

required time, he shall be deemed to have waived the right or privilege.

LOCAL BOARD MEMORANDUM No. 14

SUBJECT: PROCEDURES TO BE FOLLOWED WHEN REGISTRANT REFUSES TO SUBMIT TO PHYSICAL EXAMINATION OR MENTAL TEST, OR FAILS TO REPORT FOR OR SUBMIT TO INDUCTION

3. *Action by Local Board Subsequent to Refusal of Its Own Registrants to Submit to Armed Forces Examination.* —Whenever the local board receives its own registrant's records with a letter of transmittal stating in detail the refusal of the registrant to submit to the physical examination or mental test, or any part thereof, from the joint examining and induction station or from the local board to which the registrant was transferred for armed forces physical examination, it shall proceed as follows:

(a) Retain the registrant in Class I-A, Class I-A-O, or Class I-O, as the case may be.

(b) If the registrant is in Class I-O, consider him for all purposes as if he had been physically and mentally examined and found acceptable for military service and process him thereafter in the same manner as any other registrant in Class I-O who has been found acceptable for service after being given an armed forces physical examination.

LOCAL BOARD MEMORANDUM No. 56

SUBJECT: CLASSIFICATION OF DIVINITY STUDENTS.

4. *Responsibility of Local Board and Information Required.*

(b) To substantiate the claim of a registrant that he is a theological student, the local board must require him to furnish evidence which clearly establishes to the satisfaction of the local board that the registrant meets both of the following requirements:

(1) He is a student preparing for the ministry under the direction of a recognized church or religious organization; and

(2) He is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school.

(c) To substantiate the claim of a registrant that he is a pretheological student, the local board must require him to furnish evidence which clearly establishes to the satisfaction of the local board that the registrant meets both the following requirements:

(1) He is a student preparing for the ministry under the direction of a recognized church or religious organization; and

(2) He is satisfactorily pursuing a full-time course of instruction leading to his entrance into a recognized theological or divinity school in which he has been pre-enrolled.

(d) The local board may require from the church, religious organization, or school detailed information in order to determine whether or not the theological or divinity school is in fact a recognized school and whether or not the church or religious organization which is sponsoring the registrant is recognized.

5. *Assistance Available to Local Board.*—If the local board considers the information it has received to be insufficient for the purpose of making a determination, it should request assistance or additional information from the State Director of Selective Service. . . .

Questions Presented

1. Whether the exhaustion of administrative remedies doctrine should be applied when there is no basis in fact for denying a registrant an exemption for which he has applied, especially when a fundamental procedural error committed by the local board could not have been disclosed by the registrant's appeal through the administrative process.

2. Whether a registrant who meets every qualification for the statutory exemption as a divinity student may be denied a IV-D classification because he does not request that classification from his local board.

3. Whether a registrant may be convicted for failure to report for a physical examination when, if properly classified, he could not have been lawfully ordered to report or, if ordered to report, he could have waived the examination without penalty.

4. Whether a registrant who is unlawfully classified may be convicted for failing to possess a Notice of Classification (SSS Form 110) which reflects the unlawful classification.

5. Whether a registrant's conviction for failure to submit certain information to a local board can stand if the judge charges that the jury can find the defendant guilty if he failed to complete a questionnaire, thereby precluding the jury from determining whether he did supply the requested information in some other manner.

6. Whether a conviction for failure to submit certain information to a local board can stand if the registrant substantially complied with the information-giving requirements of the Selective Service Regulations.

7. Whether petitioner's convictions on two minor counts should be allowed to stand in light of the fact that, if petitioner had been properly classified, the prosecution on these counts might not have been brought or, if brought, might have resulted in a different verdict or sentence.

Statement of the Case

Petitioner is a Roman Catholic who, at the time he was ordered to report for induction, was a student at the Union Theological Seminary in New York City (A. 42). He registered with Local Board 15 in Manhattan in August 1961 and informed the board a month later that he was "a student preparing for the ministry at the Cathedral College of St. Joseph's Seminary . . . under the direction of the Roman Catholic Church" (Govt. Ex. 3, A. 44). After

enrolling in the University of Rochester, he was granted a II-S (student) deferment. In February 1966, while still classified II-S, petitioner applied for conscientious objector status, stating that it was his "intention to continue on to actual ordained Priesthood." The clerk of his board wrote him on March 23:

> "This will advise that the recent evidence submitted concerning your case has been reviewed by the Local Board. It is the decision of the Board that such evidence does not justify the reopening of your case and reconsideration of your present classification.
>
> However, we wish to advise that your claim as Conscientious Objector will be considered when you no longer qualify for a student classification" (Govt. Ex. 18, A. 26, 63).

In explaining this letter, the board chairman testified at trial that he rejected the application because "there weren't sufficient facts . . . to motivate me to grant the registrant the request he sought" (A. 26), and that "what he set forth did not motivate me to grant him the relief he sought" (A. 27). He added that he also rejected the application "at that time . . . because the young man was attending college and in my judgment he rated a 2S qualification which we proceeded to give him" (A. 27).

Petitioner later requested and was granted a further II-S classification in October 1966.

In April 1967, while still classified II-S and enrolled in the University of Rochester, petitioner wrote President Johnson, enclosing remnants of his torn and burnt draft card. This letter stated that even though he had "already

been accepted for graduate study in a program where" he "would probably qualify for theological deferment," he felt it necessary to "sever every link with violence and war" and to refuse to cooperate "with the military-industrial complex which seems to be dictating our international policy" (Govt. Ex. 25, A. 50). A copy of this letter was forwarded to the Selective Service System (A. 39, 63) and, on April 26, 1967, to petitioner's local board (Govt. Ex. 25, A. 50).

In May 1967 petitioner was interrogated by two FBI agents, at which time he told them that he had been accepted for admission to Union Theological Seminary, that he would begin studies there in September of that year, and that one of his mailing addresses would be the dormitory at the Seminary (A. 24-25). At trial a third agent testified somewhat ambiguously of a conversation with a board clerk on May 19, 1967, during which he asked her if petitioner's present classification would be changed if he were to attend Union Theological Seminary (A. 20-21).

After petitioner's graduation from the University of Rochester in June 1967, his board sent him a Current Information Questionnaire (SSS Form 127). Petitioner returned it unanswered and in a covering letter announced that "further correspondence," from the draft board would "simply be returned unopened," consistent with his belief that "cooperation is approval" (Govt. Ex. 33, A. 54). On September 19, 1967, petitioner was reclassified I-A, notwithstanding his still pending application for conscientious objector status.

The board chairman's testimony at trial regarding petitioner's application was contradictory. At one point he said that the Board "reviewed the record of the young

man's case when we gave him the I-A and all pertinent information therein contained" (A. 37). At another point he said, "Based on our previous determination that his request for conscientious objector status was denied, we had no alternative at that time but to give him a I-A, which we did" (A. 35).

In any case, the Board mailed him a notice of classification (SSS Form 110) and a letter informing him that he had a right to ask for a personal appearance or an appeal within 30 days. Petitioner returned the envelope unopened, writing on the outside:

> "Returned pursuant to previous declaration and notification" (A. 64).

Petitioner matriculated at Union Theological Seminary as a full-time student on September 27, 1967. Subsequently, petitioner returned unopened an order directing him to appear for a physical examination scheduled for October 18, 1967, and did not appear for it. He was declared delinquent on November 21, 1967, and returned a delinquency notice sent the next day.

While petitioner did not make formal written request for a IV-D (divinity student) classification from his draft board, he again had occasion to advise the government of his attendance at Union. In November 1967, petitioner testified before a federal grand jury investigating Selective Service violations and explicitly stated that he was a divinity student at Union studying for the Roman Catholic priesthood (A. 39). The grand jury was convened in the Southern District of New York, and the questioning of petitioner was conducted by John Robinson, the same

Assistant United States Attorney who later brought petitioner's indictments and prosecuted the case in the trial court.

On January 11, 1968, only a few weeks after his grand jury appearance and while still at Union, petitioner was ordered to report for induction on January 29, 1968. He did report, filled out various forms soliciting a broad range of information, underwent a complete physical examination, and was found acceptable for service. He then refused to submit to induction, again stating his moral and religious objections to military service.

Petitioner's Selective Service file was then forwarded to the United States Attorney with a notation that the New York City Director of Selective Service recommended prosecution only on the charges of refusing induction and non-possession of a draft card (Govt. Ex. 39, A. 58-59). Nevertheless, the government sought a four-count indictment.

Petitioner was indicted on February 29, 1968 and charged with refusal to submit to induction (Count One), refusal to report for a physical examination (Count Two), failure to have in his personal possession a valid notice of classification (Count Three), and failure to submit certain requested information (Count Four), all in violation of Title 50, App., U.S.C. §462(a) and various selective service regulations. Petitioner moved to dismiss the indictment on various constitutional and statutory grounds. The motion was denied on June 13, 1968 by Judge Edmund L. Palmieri on the ground that it presented factual matters which had to be resolved at trial (A. 7-16).

Petitioner was tried before a jury. At the conclusion of the trial, Judge Thomas F. Murphy made findings that (1) petitioner, at the time of refusing induction, was pursuing a full-time course of instruction at Union Theological Seminary, a recognized theological divinity school; (2) Union was a non-denominational school not under the direction of a recognized church or religious organization, and (3) petitioner's local board had considered his application for conscientious objector status in September 1967 (A. 41-42).

Petitioner was found guilty on all four counts, and on January 16, 1969, was sentenced by Judge Murphy to two years on each count, the sentences to run concurrently.

Petitioner's conviction was affirmed by the Court of Appeals, Circuit Judge Feinberg dissenting, on March 31, 1970. The majority, although holding that consideration of petitioner's claims for exemption as a divinity student and as a conscientious objector was barred by his failure to appeal his I-A classification, agreed with Judge Feinberg that the local board lacked a "basis in fact" for denying the conscientious objector claim (A. 71-72). Judge Feinberg said that petitioner should have been classified I-O and that the exhaustion doctrine should not have been applied to petitioner's failure to appeal from his I-A classification (A. 83-86). His position was that convictions on Counts One and Two should have been reversed and a judgment of acquittal directed on the basis of the improper classification and that convictions on Counts Three and Four should have been reversed and remanded for reconsideration (A. 89).

Summary of Argument

In 1961, when Vincent McGee, Jr. registered for the draft, he told his local board that he was studying for the Catholic priesthood. For the next several years he pursued that goal and in the fall of 1967 he entered Union Theological Seminary. By virtue of a Congressional exemption for divinity students and ministers, he enjoyed the prospect of remaining free of military service. But approximately five months after entering Union, petitioner was indicted on four counts of violating the Military Selective Service Act of 1967.

Petitioner had applied for conscientious objector status while still in college. But before his board could act on his application, he concluded, in the spring of 1967, that he must "sever every link with violence and war." So he wrote the President of the United States in order to express "the fundamental belief that man must build and not destroy, love and not hate." He said that he would no longer cooperate with Selective Service, but hoped instead to "follow the words of the Pope at the United Nations, 'War, never again'" (Govt. Ex. 25, A. 50). Subsequently, his board rejected his conscientious objector claim wholly without basis. He did not request exemption as a divinity student.

The government responded intemperately to McGee's non-cooperation. For assuming the profound moral posture of refusing to cooperate with the machinery for selecting men to go to war, McGee was prosecuted on four separate charges carrying a maximum liability of 20 years imprisonment and $40,000 fine. The Selective Service System itself recommended prosecution on only two counts. Had McGee

arrived at his position when he was 18 and simply refused to register, he could only have been prosecuted on a single charge.

The government's zeal in this case led it to seek a four-count indictment despite specific knowledge that the defendant was entitled to a statutory exemption from military service. The majority below considered petitioner's position "stiff-necked" (A. 76) and upheld a conviction on four counts simply because he declined to appeal the local board's action. This despite the court's finding that petitioner should have been classified as a conscientious objector.

I.

The court below improperly applied the exhaustion doctrine to petitioner's claim for conscientious objector status.

Although the court below agreed that petitioner was unlawfully denied conscientious objector status, his conviction on Count One was upheld because he failed to exhaust his administrative remedies. That result misconstrues this Court's decision in *McKart* v. *United States,* 395 U.S. 185 (1969).

The exhaustion doctrine evolved in the context of affirmative litigation where its effect was merely to delay relief. It is improperly applied in a defensive context, particularly criminal prosecutions, where the administrative process is at an end and the effect of the rule is to permanently deny relief. *Estep* v. *United States,* 327 U.S. 114, 128-29 (1946) (Murphy, J., concurring). The requirement of exhaustion is generally relaxed in at least two situations: where the

agency has exceeded its jurisdiction or has violated a statutorily granted right. See generally, Layton and Fine, "The Draft and Exhaustion of Administrative Remedies," 56 *Geo. L.J.* 315 (1967). Both situations were present here. Thus the petitioner's claim should have been considered despite the failure to exhaust.

This Court has not permitted agency rules to abridge fundamental rights. *Greene* v. *McElroy,* 360 U.S. 474 (1959). Similarly, courts should not impose judge-made rules such as the exhaustion doctrine to limit rights in defense to enforcement proceedings, such as criminal prosecutions, without specific mandate from Congress. *Smith* v. *United States,* 199 F.2d 377 (1st Cir. 1952); cf. *Yakus* v. *United States,* 321 U.S. 414 (1944). Congress has not required exhaustion of administrative remedies as a condition of defending a criminal prosecution under the Military Selective Service Act of 1967.

Exhaustion is not required by this Court's ruling in *McKart* where a court is asked to review the misapplication of a legal standard by a local board to an undisputed set of facts. *United States* v. *Davila,* 429 F.2d 481 (5th Cir. 1970).

As Judge Feinberg demonstrated in dissent, the local board never considered petitioner's conscientious objector application on its merits. This fundamentally lawless action by the local board, *Oestereich* v. *Selective Service System Local Board No. 11,* 393 U.S. 233 (1968), is particular justification for relaxation of the exhaustion requirement.

II.

As a full-time student at Union Theological Seminary studying for the priesthood under the direction of the Roman Catholic Church, petitioner was entitled to a IV-D classification despite his failure to request the classification from his local board.

Despite his failure to request exemption as a divinity student, §6(g) of the Act mandates exemption of those who qualify. Petitioner qualified for the exemption and conveyed that information to the President of the United States, to FBI agents investigating Selective Service violations and to the Assistant United States Attorney who prosecuted him. Petitioner's local board knew of his likely eligibility for the exemption. Despite that knowledge the board ordered him to report for induction and the Assistant United States Attorney sought these indictments.

The notice which the government had of petitioner's eligibility for the exemption was sufficient without a specific claim being made to the board. *United States* v. *Holmes*, 426 F.2d 915 (2d Cir. 1970).

III.

The conviction on Count Two for failure to report for a physical examination cannot stand because it was a direct result of petitioner's unlawful classification.

Had petitioner been classified I-O as a conscientious objector, he could have been lawfully called for a physical examination, but his failure to report would not have been criminal. *Shoemaker* v. *United States*, 413 F.2d 274 (9th Cir. 1969); Local Board Memorandum No. 14.

Had petitioner been classified IV-D, he would not have been in a class which could have been lawfully ordered to report for induction. 32 C.F.R. 1628.11(c).

IV.

Since petitioner was improperly classified I-A, he was not guilty of failing to posses a *valid* Notice of Classification.

32 C.F.R. 1623.5 requires a registrant to have in his possession a "valid" Notice of Classification. Count Three charged petitioner with failing to possess the I-A classification card mailed to him in September 1967. Since petitioner should properly have been classified I-O or IV-D, that card was not a valid one and his failure to possess it violated no lawful duty. *United States* v. *Hertlein,* 143 F. Supp. 742 (E.D. Wis. 1956).

V.

The conviction on Count Four cannot stand because petitioner substantially complied with the requirement that he submit the information requested by his board.

Petitioner was charged in Count Four with failing to provide certain information requested by his local board. Petitioner substantially complied with that request. Nevertheless, the trial judge improperly instructed the jury that a finding that petitioner merely failed to return a questionnaire, rather than failed during a period of time to provide certain information, would support a conviction on this count. *Bollenbach* v. *United States,* 326 U.S. 607, 613 (1946).

Petitioner substantially complied with the only duty he owed the board by giving them sufficient information to classify him I-A. He was not obliged to provide the board with information justifying another classification. 32 C.F.R. 1622.1(c), 1622.10 and 1623.1(b); *United States* v. *Rubinstein*, 166 F.2d 249 (2d Cir. 1948) (Hand and Swan, JJ., concurring).

VI.

If this Court does not direct a judgment of acquittal on Counts Three and Four, the Court should reverse the convictions on those counts and remand to the trial court so that the government may determine whether it wishes to press the prosecution on those counts alone.

Judge Feinberg, dissenting from the judgment below, urged reversal and entry of a judgment of acquittal on Counts One and Two and reversal of the convictions on two of the minor counts of the indictment, Counts Three and Four. He suggested a remand to the trial court in order for the government to reconsider the prosecutions on those counts. He suggested also that the trial judge may have imposed a shorter sentence on those counts if he realized that petitioner should have been granted an exemption by his local board.

ARGUMENT

I.

The court below improperly applied the exhaustion doctrine to petitioner's claim for conscientious objector status.

The majority opinion and dissent below agreed on at least one point: petitioner was denied conscientious objector status by his local board without a basis in fact (A. 71-72, 79). Petitioner's conviction and two year jail sentence for violation of a concededly unlawful induction order was sustained because he failed to exhaust his administrative remedies. That result was premised upon a misapprehension of the exhaustion doctrine and an unnecessarily restrictive reading of *McKart* v. *United States*, 395 U.S. 185 (1969).

In *McKart* this Court re-examined for the first time in twenty-three years the requirement that a defendant in a criminal prosecution for violation of the selective service law must have exhausted all of the administrative remedies available to him in order to attack the legality of his classification. That requirement in draft cases emerged from the first two cases to reach this Court under the Selective Training and Service Act of 1940, 54 Stat. 835, 50 U.S.C. App. §301, *Falbo* v. *United States*, 320 U.S. 549 (1944), and *Estep* v. *United States*, 327 U.S. 114 (1946).

Some judges have expressed reservations about applying the exhaustion rule to bar defenses in a criminal

prosecution,[1] and several courts have found particular circumstances justifying relaxation of the exhaustion rule.[2]

At the least, it can be said that many of the lower courts have not been altogether comfortable with invoking the exhaustion rule as a bar to a defense—frequently the only defense—in a criminal prosecution and, implicitly, giving judicial sanction to unlawful local board action. Given the opportunity to re-examine the entire exhaustion problem, the Court in *McKart* declined to treat the case before it simply as a "particular circumstances" case, but rather explored at length the analytical basis for the application of the exhaustion rule to draft prosecutions. Petitioner submits that the theory and purpose of the exhaustion rule justify the suspicion cast upon it by *McKart* in cases such as this.

A. *The Exhaustion Rule Evolved in the Context of Affirmative Litigation Where Its Effect Was to Delay Relief; It Is Misapplied in a Defensive Context, Particularly Criminal Prosecutions, Where Its Effect Is to Permanently Bar Relief.*

The classic statement of the exhaustion rule, "that no one is entitled to judicial relief for a supposed or threatened

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[1] "[T]o this court it appears unduly harsh to convict a young man following criminal prosecution for failure to submit to induction into the armed forces simply because he omitted to follow certain procedural rules prescribed in the selective service regulations. This is especially true when as in this case the registrant has satisfied this court of the sincerity of his convictions. However, the cases . . . require this court to conclude that it has no alternative but to enter a judgment of conviction in this case." *United States* v. *Warner*, 284 F. Supp. 366, 371 (D. Ariz. 1968).

See also, *United States* v. *Brown*, —— F.2d ——, 3 SSLR 3198, 3201 (3rd Cir., Aug. 7, 1970) (Adams, *J.*, concurring) *decision pending on rehearing in banc.*

[2] See, *e.g.*, *Wills* v. *United States*, 384 F.2d 943 (9th Cir. 1967); *United States* v. *Harris*, 302 F. Supp. 1194 (D. Ore. 1968); *Do-*

injury until the prescribed administrative remedy has been exhausted," *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938), assumes two things, neither of which is consistent with its application to a draft prosecution: first, that a person is affirmatively seeking judicial review and, second, that there are still administrative remedies for him to exhaust.

> "The usual exhaustion case is one where review is sought prematurely. To deny review is simply to require the plaintiff further to pursue the administrative process or to await its conclusion." Jaffe, "Exhaustion of Administrative Remedies," 12 *Buff. L. Rev.* 327, 350 (1963).

But the defendant in a criminal prosecution is not seeking affirmative relief nor does he have any further administrative remedies to pursue. For him, the administrative process has already reached its conclusion. The Selective Service System has given him a final order. To deny review of his claim on exhaustion grounds is not to delay relief, it is to permanently foreclose it. As one court noted:

> "It cannot be denied that an administrative remedy was available to the defendant here for securing a reversal of the local determination and that such remedies were not exhausted. Assuming such failure bars the defendant from seeking affirmative relief, it is quite a different matter to say that he must necessarily exhaust those remedies in order to challenge the administrative order by way of defense to its

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nato v. *United States*, 302 F.2d 468 (9th Cir. 1962); *United States* v. *Seeley*, 301 F. Supp. 811 (D. R.I. 1969); *United States* v. *Carson*, 282 F. Supp. 261 (E.D. Ark. 1968).

enforcement." *United States* v. *Fritz Properties*, 89 F. Supp. 772, 778 (N.D. Cal. 1950).

See also, *Woods* v. *Laabs*, 92 F. Supp. 220 (W.D. Mich. 1950).

The fact is that the exhaustion doctrine, a judicially fashioned creature of affirmative litigation, was constructed by courts[3] to serve interests which can no longer be served by the time a prosecution has been brought. For example, exhaustion is frequently required in order to permit the litigant to vindicate his claim administratively or to permit the agency to correct its own errors, reasons cited by the majority below. See Point ID, *infra*. But applying the exhaustion doctrine at trial to bar a defense—after the administrative process has reached its conclusion—will serve neither of those interests.

Sometimes exhaustion is required in order to avoid interrupting the administrative process and to permit the agency to reach a final decision. Thus, courts have declined to review administrative action while it was still subject to further consideration by the agency. However, the fear of "litigious interruption," of disturbing the agency's consideration of the matter, see, *e.g.*, *Clark* v. *Gabriel*, 393 U.S. 256 (1968), has no relevance when the registrant's defense at a criminal trial is based upon the invalidity of his classification and requires the trial court to examine the local board's decision. The administrative role of the Selective Service System is then over and its final decision, in the form of an induction order, has been rendered. As Justice Murphy noted, concurring separately in *Estep* v. *United States*, 327 U.S. 114, 128-29 (1946):

[3] That the exhaustion doctrine in draft cases is a judge-made rule, not compelled by statute, is not in dispute and in fact was confirmed by both the majority opinion and the concurring opinion of Mr. Justice White in *McKart*, 395 U.S. at 197, n. 14 and 206.

"The selective process, in relation to the petitioners, was finally and completely interrupted at the time when they disobeyed the induction orders and subjected themselves to possible criminal liability. Any subsequent judicial review of the induction orders could have no possible effect upon the continuance of the selective process and could bear no earmarks of a 'litigious interruption.' Thus at the time of petitioners' trials the courts were confronted with accomplished interruptions rather than with a theory. A decision at that point to grant petitioners full hearings and to protect their constitutional rights would simply be a recognition of the fact that the Constitution protects the petitioners whenever their liberty is at stake, whatever may have been their motives in disobeying the orders."

This reasoning was adopted by Judge Zirpoli in *United States* v. *Gilmore*, 2 SSLR 3582 (N.D. Cal. 1969).

To summarize, courts have created the exhaustion doctrine in deference to the expertise of the administrative process and out of concern for not disrupting its operation. Since the "doctrine is concerned with the timing of judicial review of administrative action," 3 Davis, *Administrative Law* (1958) §20.01 at 57, it is logically invoked when its effect is merely to delay judicial review, not, as in a draft prosecution, to deny it completely.[4] In fact, en-

[4] One noted commentator has made the same observation regarding use of the exhaustion doctrine to bar review of military determinations:

"It appears, however, that phrasing the exhaustion doctrine in terms of complete denial of review is a misapplication of the doctrine. The exhaustion doctrine . . . does not bar jurisdiction but rather permits consideration of timing and comity by a

grafted onto the exhaustion doctrine are several exceptions to its application, at least two of which would apply to criminal trials and would warrant judicial review of challenged classifications despite the registrant's failure to exhaust.

The first exception to the requirement of exhaustion arises where the court's denial of review would cause irreparable injury. The definition of such injury by one commentator clearly establishes its relevance to the case at bar:

> "Irreparable injury in its strictest sense is the probable loss, if exhaustion is required, of the value . . . of an asserted right or defense." Jaffe, *Judicial Control of Administrative Action* 429 (1965).

In *Public Util. Commission* v. *United Fuel Gas Co.*, 317 U.S. 456 (1943), the Court waived the requirement of exhaustion where the company was faced with immediate and irreparable injury (the expenditure of a large amount of money) if forced to pursue its administrative remedies. Justice Frankfurter, for the Court, cautioned against application of the exhaustion doctrine in "blind disregard of fact," *id.* at 469, observing that the orders in question were

> ". . . on their face invalid. No inquiry beyond the orders themselves and the undisputed facts which underlie them is necessary in order to discover that they are in conflict with the federal Act." *Ibid.*

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court in deciding whether to exercise its proper jurisdiction and review a case at a particular time. A court applying the exhaustion doctrine has jurisdiction but chooses to withhold consideration of the issues until the completion of a foreign decision-making process." Sherman, "Judicial Review of Military Determination," 55 *Va. L. Rev.* 483, 521 (1969).

If the loss of money can constitute irreparable injury so as to excuse a failure to exhaustion, *a fortiori* the possibility of conviction and imprisonment facing the defendant in a criminal prosecution justifies relaxation of the exhaustion requirement. When, as here, judicial inquiry need not go "beyond the orders themselves and the undisputed facts which underlie them . . . in order to discover that they are in conflict with the federal Act," application of the exhaustion doctrine is particularly inappropriate.

A second exception to the exhaustion doctrine occurs when an agency has exceeded the jurisdiction conferred on it by Congress or has infringed a right protected by Congress. *Wills* v. *United States,* 384 F.2d 943 (9th Cir. 1967).

In *Skinner & Eddy Corp.* v. *United States,* 249 U.S. 557 (1919), the Court permitted judicial review despite the failure to exhaust administrative remedies where it was claimed that the Interstate Commerce Commission had exceeded its statutory powers. That principle, applied to this case, would permit review of petitioner's claim that the local board denied his conscientious objector claim without a basis in fact since classification without a basis in fact, as this Court recognized in *Estep* v. *United States,* 327 U.S. 114, 122 (1946), exceeds the board's jurisdiction.

In *Leedom* v. *Kyne,* 358 U.S. 184 (1958), the Court reviewed an action brought to review a clearly illegal order of the National Labor Relations Board. Declining to require administrative appeal of the order, the Court said that it could not

> ". . . lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Id.* at 190.

Petitioner's right to conscientious objector status is guaranteed by statute. 50 U.S.C. App. §456(j). When, as the court below conceded, that status was denied him by the local board without a basis in fact, its action clearly overrode a right guaranteed by Congress and should have been reviewable without exhaustion of further appeals.

B. *Unless Mandated by Statute, Courts Have Traditionally Refused to Bar a Defense to Enforcement of an Allegedly Invalid Administrative Order by Invoking the Exhaustion Doctrine.*

What emerges from this review of the exhaustion doctrine is that courts have declined to apply it where to do so would work a substantial deprivation of rights. Its application to criminal prosecutions inevitably has that effect and, therefore, should be tolerated only when commanded by Congress. When Justice Murphy dissented from this Court's ruling which lifted the exhaustion doctrine out of its traditional administrative law setting and applied it to criminal prosecutions for violation of the draft law, he said:

> "No other barriers to judicial review of the induction order in a criminal proceeding are revealed by the structure of the Act. . . ." *Falbo* v. *United States,* 320 U.S. 549, 558 (1944).

Justice Murphy's search through the "structure of the Act" for authority to foreclose defenses by applying the exhaustion rule finds support in some circuit court decisions which a leading commentator says "embody the orthodox law." 3 Davis, *Administrative Law* §23.07 at 321 (1958). In those cases, the question, as here, was the application of traditional exhaustion concepts originating in

affirmative litigation to defensive situations involving the enforcement of a challenged order.

The government, in *Smith* v. *United States,* 199 F.2d 377 (1st Cir. 1952), sought to invoke the doctrine against landlords resisting an action to recover damages under the Housing and Rent Act of 1947, as amended, 63 Stat. 27, 50 U.S.C. App. §1896(b). The landlords had failed to seek review of the agency's initial determination. Judge Magruder, writing for the court, noted that the exhaustion doctrine

> "... had its origin in a discretionary rule adopted by courts of equity to the effect that a petitioner will be denied equitable relief when he has failed to pursue an administrative remedy by which he might obtain the same relief." 199 F.2d at 381.

That situation he distinguished from defensive litigation where the doctrine's application would not merely delay relief by requiring a litigant to pursue an alternative remedy but would deny relief permanently by depriving him of the opportunity to challenge the order against which he defended. Conceding that some cases had upheld the exhaustion rule in enforcement proceedings and precluded challenges to the validity of the regulation or order, Judge Magruder observed that these results were demanded

> "... *by prescription of the statute,* rather than by application of the accepted rule in courts of equity that equitable relief would be denied to a petitioner who had failed to exhaust available administrative remedies." *Ibid.* (Emphasis added.)

The Court then carefully scrutinized the act and found no authority for denying the landlord the right to challenge the order despite the fact that he had failed to pursue a previously available administrative procedure.

Subsequently, in *United States* v. *McCrillis,* 200 F.2d 884 (1st Cir. 1952), Judge Magruder again analyzed the exhaustion doctrine and reaffirmed the conclusion in *Smith* that the doctrine

> "... is wholly misapplied when invoked against a landlord who is not seeking equitable relief but is merely defending himself against an enforcement action." *Id.* at 885.

Judge Magruder stated that cases where the doctrine had been applied to enforcement proceedings were not to the point because

> "... there the Congress itself had withdrawn from the district courts jurisdiction or power to consider the validity of price or rent regulations or orders, and, as that Act originally provided, the only way to raise the issue of validity was by filing a statutory protest with the Price Administrator, followed by a complaint in the Emergency Court of Appeals upon administrative denial of the protest." *Ibid.*

Judge Magruder again searched the Housing and Rent Act in vain for some requirement that administrative remedies be exhausted.

> "In the absence of any statutory provision on the subject, we stated in Smith v. United States, supra [199 F.2d 382], that we were not aware 'of any general

judge-made doctrine that a defendant in an enforcement suit, charged with having violated an administrative regulation or order, is precluded from setting up the defense that the regulation or order is invalid, merely because the defendant had failed to make use of an available administrative procedure by which he might have obtained administrative action to set aside the regulation or order.' We know of no controlling precedent in the Supreme Court establishing any such proposition." *Id.* at 886.

He then distinguished two of the major decisions upon which application of the exhaustion doctrine in draft cases is frequently predicated, *Yakus* v. *United States,* 321 U.S. 414 (1944), and *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U.S. 41 (1938), by noting that exhaustion was explicitly mandated by Congress in those two situations.

The position petitioner urges was stated succinctly in *FPC* v. *Arizona Edison Co.,* 194 F.2d 679, 686 (9th Cir. 1952), "In the absence of an express statutory command we find no authority requiring a court of equity to enforce an administrative order invalid on its face."

C. *Exhaustion of Administrative Remedies as a Condition of Defending a Criminal Prosecution Is Not Required by the Military Selective Service Act of 1967.*

This Court has consistently taken the position that fundamental rights cannot be limited by rules of administrative agencies absent an explicit mandate from Congress. See, *e.g., Greene* v. *McElroy,* 360 U.S. 474 (1959); *Kent* v. *Dulles,* 357 U.S. 116 (1958); *Ex parte Endo,* 323 U.S. 283 (1944). Similarly, courts should not allow judge-made rules, such as the exhaustion rule, to abridge rights of draft regis-

trants without explicit Congressional authority. The court below conceded petitioner's entitlement to an exemption provided by Congress, but applied the exhaustion rule to bar judicial review.

Neither the Selective Training and Service Act of 1940, 54 Stat. 885; 50 U.S.C. App. §§301-318, nor its amended versions of 1948, Act June 24, 1948, c. 625, Title I, §1, 62 Stat. 604, and 1951, Act June 19, 1951, c. 144, Title I, §1(a), 65 Stat. 75, made any mention of an exhaustion requirement. Although those acts contemplated the existence of local boards and a system for appealing classifications, there was no suggestion that judicial review of the order of a local board was conditioned on pursuing administrative appeals.

When Congress reconsidered the draft laws in 1967, one of its concerns was judicial review of local board actions. Committees of both Houses took up the issue. Although both Committees endorsed a provision restricting judicial review prior to induction, they did not make any recommendation that would require exhaustion of appeals as a condition of judicial review of a post-induction challenge to local board actions.[5] In fact, the report of the Senate Armed Services Committee stated specifically and without qualification:

> "If the registrant does not submit to induction, he may raise as a defense to a criminal prosecution the issue of the legality of the classification."[6]

Section 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. App. §460(b)(3) (hereinafter referred

[5] H.R. Rep. No. 267, 90th Cong., 1st Sess., 30-31 (1967); S. Rep. No. 209, 90th Cong., 1st Sess., 10 (1967).

[6] S. Rep. No. 209, *supra*, at 10.

to as the "Act"), which incorporated the Committees' suggestions is concerned solely with the question of pre-induction review. The power to review a classification *following* refusal of induction is not statutorily qualified.[7] Since Congress had the question of judicial review specifically before it in 1967, one can only infer that it did not wish to qualify the right granted under the statute by procedural formalities.[8] When Congress said that conscientious objectors "shall be exempt," 50 U.S.C. App. §456(j), it did not authorize the courts to limit that category to those who pursued their administrative appeals.[9]

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[7] Both Justices writing in *McKart* presumed that Congress had not mandated exhaustion. See note 3, *supra*.

[8] When Congress has wished to condition judicial review on exhaustion of administrative remedies, it has done so quite explicitly. The Agricultural Adjustment Act, 7 U.S.C. §1367, deprived federal courts of jurisdiction to consider the validity of any determination made under the act except where administrative review had been sought. In *Miller* v. *United States*, 242 F.2d 392 (6th Cir. 1957), defense to an enforcement proceeding brought under the act was rejected on exhaustion grounds.

[9] We do not argue here that a registrant who fails to even present his conscientious objector claim to a local board has a right to have that claim evaluated in court. Petitioner presented his claim to the local board. The requirement that a claim be *initially* presented to the agency, sometimes called "primary jurisdiction" or "preliminary jurisdiction," does not imply a requirement of exhaustion. The distinction was discussed in *United States* v. *Fritz Properties*, 89 F. Supp. 772, 777 (N.D. Cal. 1950):

> "The 'exhaustion' doctrine is a product of judicial self-limitation resembling the requirement of equity jurisdiction—that a litigant has no standing in equity where he has an adequate remedy at law—although matters of comity and need for orderly administrative procedure helped shape the doctrine. The 'preliminary jurisdiction' rule, on the other hand, presupposes a complete absence of judicial power to deal with the matter because of a legislative grant of exclusive primary jurisdiction to an administrative body."

See also, 3 Davis, Administrative Law §1901 (1958). A failure to observe that distinction led the Third Circuit to improperly apply

D. *The Decision Below Unduly Restricted the Meaning of* McKart.

The limitations discussed above on the applicability of the exhaustion doctrine to draft prosecutions were recognized in *McKart* and led this Court to warn generally that the

> "... use of the exhaustion doctrine in criminal cases can be exceedingly harsh ... [and] should not be tolerated unless the interests underlying the exhaustion rule clearly outweigh the severe burden imposed upon the registrant if he is denied judicial review." 395 U.S. at 197.

The Court analyzed the exhaustion doctrine and noted those factors which generally weighed in favor of the exhaustion doctrine. The majority below reviewed those same factors and, finding three of them applicable to the instant case, applied the exhaustion doctrine. *McKart*, however, did not say that the presence of those factors *mandates* application of the exhaustion rule. Nor could it have, for in fact all three factors were present in *McKart*.

The first of those factors, that petitioner might have been "successful in vindicating his rights in the administrative process," (A. 73), was obviously present in *McKart*. Petitioner there, just as petitioner here, could have appealed the denial of his claimed exemption and been granted it. Similarly, the second factor, which resembles the first, namely "that the agency be given a chance to discover and correct its own errors," (A. 73), was present in *McKart*.[10]

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the exhaustion doctrine because "Congress has designated an administrative agency as the initial forum for the adjudication of contested rights ...' *United States* v. *Zmuda*, 423 F.2d 757 (3rd Cir. 1970).

[10] The Second Circuit's substantial reliance on the possibility of the local board's action being reversed by the appeal board might

McKart did not finally rely on those factors because they simply were not germane to the case before the Court. That is, however appropriate it may have been to instruct registrants to exhaust their administrative remedies because they might be "successful" or because Selective Service might have corrected "its own errors," such advice did not help evaluate McKart's own case. At the time McKart came to this Court, the administrative process was over. The opportunity for McKart to pursue his administrative remedies there was no longer open. If those factors were to be relied on, McKart had to lose—and not just temporarily, as in the typical administrative exhaustion case where judicial review is merely postponed, but rather he had to lose permanently. There being no further administrative remedies to exhaust, his conviction would stand.

Implicit in the Court's decision in *McKart* is the recognition that the two factors described above might well be appropriate for consideration where there were still administrative remedies to which a petitioner could be remitted, but that they were of little relevance in a criminal case where the administrative process was at an

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be considered in light of the Marshall Commission's disclosure that, in fiscal 1966 (the last year for which statistics are available) the New York City Appeal Board, which had jurisdiction over petitioner's board, reversed local board classifications in only 7% of the appeals it heard, one of the lowest percentages in the country. Report of the National Advisory Commission on Selective Service, "In Pursuit of Equity: Who Serves When Not All Serve?" 110 (1967). There is no way of knowing how much consideration petitioner's appeal board would have given his case, but another appeal board was found to allot less than one minute to each case before it and to decide those cases on the basis of summaries of registrants' files prepared by the local board clerk rather than upon review of the file itself. *United States* v. *Wallen*, —— F. Supp. ——, 3 SSLR 3125 (D. Minn. 1970). Petitioner does not argue that, on that basis, an appeal would have been futile. But the interest "underlying the exhaustion rule" might be somewhat diminished given the remote likelihood of success on appeal.

end. A more relevant concern in that situation, the third factor analyzed by the court below, was what would happen if the failure to exhaust were excused. In other words, if, as a general rule, exhaustion is preferred—for reasons which relate in part to the two factors we have been discussing—will a decision excusing exhaustion encourage other registrants to avoid their administrative remedies? In answering this question, the Court came to the fundamental difference between a consideration of the exhaustion requirement in its traditional setting—an affirmative request for relief in advance of completing the administrative process—and in the context of a criminal defense. Whereas in the former situation a general relaxation of the exhaustion requirement might well encourage others to seek immediate judicial relief and by-pass the administrative agency, this Court found no such danger in McKart's situation:

> "We doubt whether many registrants will be foolhardy enough to deny the Selective Service System the opportunity to correct its own errors by taking their chance with a criminal prosecution and a possibility of five years in jail. The very presence of the criminal sanction is sufficient to ensure that the great majority of registrants will exhaust all administrative remedies before deciding whether or not to continue the challenge to their classification. . . . In short, we simply do not think that the exhaustion doctrine contributes to the fairly low number of registrants who decide to subject themselves to criminal prosecution for failure to submit to induction." 395 U.S. at 200.

The simple fact which was apparent in *McKart,* and which, we believe, must control here is that relaxation of

the exhaustion rule in criminal prosecutions will be of no concern to the average registrant involved with the Selective Service System. To the registrant who seeks to be deferred or exempt from military service, the fact that he can challenge his classification at trial if indicted for refusal to submit to induction is irrelevant.[11] He would still have to persuade a court that the local board had no "basis in fact" for denying his claim, whereas he would only have to convince the Selective Service System that, on the weight of all the evidence, he deserves the classification.[12] One court, in declining to require exhaustion, stated:

> "Exercising judicial review in this case will not significantly encourage circumventing the administrative process by resort to the courts. As *McKart* itself notes, the opportunity to appeal is one that few registrants will knowingly forego, because of the risk incident to determining the issue of classification in court under the strict basis in fact test, with the possibility of criminal conviction." *United States* v. *Davila*, 429 F.2d 481, 485 (5th Cir. 1970).

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[11] Twenty years ago, a district court, distinguishing between affirmative and defensive actions, responded similarly to the government's prophecies regarding the relaxation of the exhaustion requirement in a rent enforcement proceeding:

> "It should also be noted that the fear of wholesale violations of such administrative orders are probably unfounded, since a party wishing to challenge the administrative jurisdiction in such a manner, runs the risk of liability for treble damages if the administrative contention be upheld by the court, a sufficient deterrent in a close case." *United States* v. *Fritz Properties*, 89 F. Supp. 772, 780 (N.D. Cal. 1950).

[12] Other inducements for a registrant to appeal a local board's denial of his claim are discussed in *Lockhart* v. *United States*, 420 F.2d 1143, 1155 (9th Cir. 1969) (dissenting opinion).

Thus, if a registrant wants a classification other than I-A, he will, regardless of what the Court does in this case, present his claim to the local board and to the appeal board and to anyone else who will hear it.[13] What relaxation of the exhaustion requirement *will* establish, however, is that registrants will not "go to jail without having any judicial review of an assertedly invalid order." 395 U.S. at 197. Petitioner submits that to foreclose that review on the basis of the exhaustion doctrine is not consistent with the traditional understanding of that doctrine or with the intent of Congress.

The position we urge has been adopted by the Fifth Circuit, *United States* v. *Davila,* 429 F.2d 481 (5th Cir. 1970) in a case similar to the instant case. The defendant's application for conscientious objector status was denied by his local board and he failed to appeal. At trial he offered no explanation for his failure, and his claim that the denial of his conscientious objector application was without a basis in fact was rejected by the district court on exhaustion grounds. Relying on *McKart,* the Fifth Circuit decided that the exhaustion doctrine did not bar review. The court's reasoning is singularly applicable to the case at bar:

> "Disposition of Davila's claim, like McKart's, required the application of a legal standard to an undisputed set of facts. Where the file reveals no facts refuting a registrant's claim of conscientious objection, the only question remaining is the legal issue of whether or

[13] If this speculation proved to be wrong and relaxation of the exhaustion doctrine was found to subvert the Congressional purpose, such a finding, under the analysis discussed above, should properly be made by Congress.

not the registrant has made out a prima facie case for exemption." 429 F.2d at 484.

Addressing itself specifically to this Court's dictum in *McKart* that Selective Service *may* have a "stronger interest" in requiring appeal of conscientious objector claims since they "would appear to be examples of questions requiring the application of expertise or the exercise of discretion," 395 U.S. at 198, the Fifth Circuit said:

> "The appeal board can bring no special expertise to bear on this question, and the Selective Service System's discretion is explicitly limited by the legal standard that a given minimal showing requires exemption. *Witmer* v. *United States*, 348 U.S. 375, 99 L. Ed. 428 (1955)." 429 F.2d 481 at 484.

Both the government (Brief in Opposition to Petition for Certiorari, p. 7) and the court below (A. 73), as well as the majority in *Lockhart* v. *United States*, 420 F.2d 1143 (1969), rely strongly on the *McKart* dictum to argue that conscientious objector claims require exhaustion because they demand the exercise of discretion. But it is well to remember that the courts, unlike the Selective Service System, have never undertaken "an appraisal of the registrant's subjective state of mind . . . ," *id.* at 1145, in reviewing such claims. Courts, under the "basis in fact" test, may not hear evidence nor weigh facts nor review the local board's exercise of discretion. Rather, as *Davila* makes clear, the task of the court is simply to apply a legal standard to undisputed facts and determine whether, as in *McKart*, the local board committed legal error by exceeding its statutory jurisdiction.

That task, of course, is the same one which courts in draft cases have traditionally performed where registrants have taken appeals. Where a local board classifies without a basis in fact, the judicial interest in reversing such action is as great whether or not an appeal has been taken.

The Fourth Circuit, following *McKart,* has also declined to require exhaustion of a conscientious objector claim where the local board committed an error of law by applying an erroneous legal standard to the claim. *United States* v. *Eades,* 430 F.2d 1300 (4th Cir. 1970). Although the error there concerned statutory construction, the court could have required exhaustion on the basis of the two factors relied on by the court below, that the registrant might have been successful in "vindicating his rights" and that Selective Service should have been "given a chance to discover and correct its own errors." Nevertheless, the court stated that the registrant made a prima facie case for conscientious objector status and that his failure to exhaust administrative remedies was no bar to raising his defense of invalid classification. In effect, the court said that the district court should have determined whether a basis in fact existed for the registrant's classification, whether or not the registrant had appealed his classification through the administrative process.

The Fourth Circuit, in interpreting this Court's remand in *McNeil* v. *United States,* 395 U.S. 463 (1969), has made it clear that it does not mean to limit its position on exhaustion to cases where a local board has committed procedural errors. Although the court, *United States* v. *Davis,* 413 F.2d 148, 151 (4th Cir. 1969), found "special circumstances" justifying the failure to exhaust, it used this broad language regarding the general problem:

"We think *McKart* undermines the rule in this and other circuits that in conscientious objector and ministerial status cases the district court ordinarily need not examine the selective service file to determine whether or not there exists a basis in fact for the I-A classification unless the registrant has appealed to the Administrative Appeal Board."

We believe that interpretation to be consistent with *McKart* as well as with fundamental principles of fairness. The court below was seemingly more concerned with the imposition upon the resources of the judicial machinery which may have been occasioned by petitioner's failure to exhaust than with upholding a term of imprisonment for violation of an unlawful induction order (A. 76). That is a hierarchy of values which not only runs contrary to the intent of the Act but is hostile to a system of justice which has traditionally erected procedural rules to protect the accused, not to defeat him. The remarks of Judge Zirpoli are particularly apt:

"This court is unable to conclude, and the government has not pretended, that a fair and just system of selection will improperly order a man into military service, punish his refusal to submit, but foreclose his valid objections to the induction order on the ground that the defendant had been recalcitrant in observing required but unrelated procedures. Our elaborate network of constitutional safeguards for criminal defendants, for example, has been erected on the premise that guaranteed protections for the accused are not to be suspended simply because their intended beneficiary has himself broken the law. No court could sanction

violations of *Miranda* simply because the defendant had resisted arrest. The government's tu quoque argument, although not without its proper analogue in civil cases, is inappropriate to a criminal case, in which the undiminished burden must be on the prosecution. A Selective Service prosecution is a particularly noxious arena for the government's position, since it grows out of an administrative tangle frequently inhospitable to registrants and sometimes used to punish as well as to select." *United States* v. *Gilmore*, 2 SSLR 3582, 3583 (N.D. Cal. 1969) (footnotes omitted).

E. *Given the Failure of the Local Board to Ever Consider the Merits of Petitioner's Conscientious Objector Claim, an Appeal of His I-A Classification Would Have Been Futile.*

Analyzing this as a "particular circumstances" case, see cases cited at n. 2, *supra*, exhaustion should not be required because the local board committed a fundamental procedural error. As Judge Feinberg demonstrated (A. 79-82), the record is clear that petitioner's local board failed to ever consider his application for conscientious objector status on its merits. That failure is not only a violation of the regulations, 32 C.F.R. 1622.1(c), but a direct violation of the Act, which requires that a local board "shall . . . hear and determine . . . all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title . . ." 50 U.S.C. App. §460(b)(3). By failing to consider petitioner's application, the board avoided its most fundamental responsibility under the Act, to gather information so as to properly classify the registrant. What the majority calls "an inadvertent failure" (A. 75), was in fact so "basically lawless" that a court may intervene without requiring appeal through the ad-

ministrative system. *Oestereich* v. *Selective Service System Local Board No. 11*, 393 U.S. 233, 237-38 (1968). See also, *Hunt* v. *Local Board No. 197*, 423 F.2d 576 (3rd Cir. 1970); *Barker* v. *Hershey*, 309 F. Supp. 277 (W.D. Wis. 1969); *Walsh* v. *Local Board No. 10*, 305 F. Supp. 1274 (S.D.N.Y. 1969). See generally, Layton and Fine, "The Draft and Exhaustion of Administrative Remedies," 56 *Geo. L.J.* 315, 322-31 (1967); *Wolff* v. *Selective Service Local Board No. 16*, 372 F.2d 817, 825 (2d Cir. 1967).

The majority below avoided this issue by suggesting that the board first considered petitioner's application when it was filed in February 1966. Judge Feinberg correctly points out (A. 79), however, that, since petitioner was then entitled to a II-S deferment, it would have been inappropriate to consider his conscientious objector claim at that time. 32 C.F.R. 1623.2. The Second Circuit so held in *United States* v. *Bornemann*, 424 F.2d 1343 (2d Cir. 1970). The only reasonable reading of the local board chairman's testimony at trial is that the board followed the normal procedure and deferred consideration of McGee's application until he was no longer entitled to a lower classification (A. 80-81). This interpretation of the board's action is supported by the requirement that a consideration of the merits of petitioner's claim would have required a re-opening and the issuance of a new classification card (SSS Form 110). *Mulloy* v. *United States*, 398 U.S. 410 (1970); *Miller* v. *United States*, 388 F.2d 973 (9th Cir. 1967). The board did not send petitioner a new classification card because it did not consider his claim on the merits.

Nevertheless, when petitioner no longer qualified for a II-S classification and his conscientious objector claim

again came before the board, the board did no more than reaffirm its earlier decision (A. 82). Thus, on neither occasion did the board reach the merits of petitioner's conscientious objector application. As Judge Feinberg notes, an appeal by petitioner of his I-A classification would not have revealed that procedural deficiency since petitioner could not have known about it nor would his file have disclosed it (A. 84). Under these circumstances, the interest in requiring exhaustion is particularly insubstantial. The Ninth Circuit Court of Appeals recently agreed with this position:

> "A major premise supporting the requirement of exhaustion is that recourse to the full administrative process might satisfactorily have resolved the debated issues. Accordingly, it is unlikely that a court would require exhaustion if an administrative body's actions constitute a readily discernible error of a type unlikely to be corrected by further recourse to the administrative process and resulting in great injury to a party or to the public." *Craycroft* v. *Ferrall,* 408 F.2d 587, 594 (9th Cir. 1969).

In *United States* v. *Burns,* 296 F. Supp. 162 (D. Colo. 1969), the court considered the kind of situation presented here and waived the exhaustion requirement:

> ". . . we note also that an appeal would have been inconsequential in this instance because there would not have been any information in the file for the appeal Board to act on since the Board itself took no action." *Id.* at 165.

In the final analysis, the majority below permitted petitioner's conviction to stand despite his conceded entitlement to a statutory exemption because he was "stiff-necked," because the beliefs that had made him a conscientious objector had brought him to a moral position of noncooperation with Selective Service. That position it should be clear, hardly contravenes the unqualified Congressional intent to exempt from military service those who are "conscientiously opposed to participation in war in any form." 50 U.S.C. App. §456(j). Petitioner was entitled to and should have been granted that exemption. This Court should reverse the conviction and direct the entry of a judgment of acquittal on Count One.

II.

As a full-time student at Union Theological Seminary studying for the priesthood under the direction of the Roman Catholic Church, petitioner was entitled to a IV-D classification despite his failure to request the classification from his local Board.

Section 6(g) of the Act, 50 U.S.C. App. §456(g), exempts full-time students in recognized divinity schools who are preparing for the ministry under the direction of recognized churches from training and service under the Act. See also, 32 C.F.R. 1622.43.

There was no disagreement at trial about petitioner's status as a full-time divinity student at Union Theological Seminary, a recognized divinity school, and the trial judge so found (A. 42). Nor was there disagreement that petitioner satisfied the other statutory requirement that registrants be "preparing for the ministry under the direction of recognized churches. . . ." Petitioner testified that he was studying for the priesthood (A. 39), and his parish priest testified that he had recommended the petitioner for ad-

mission to Union (A. 64). Though not rejecting this testimony, Judge Murphy, in somewhat ambiguous language, found that Union was a non-denominational seminary and not under the direction of a recognized church (A. 42). The majority below conceded that, if Judge Murphy meant that a student at Union could not receive a IV-D classification because Union is not under the direction of a recognized church, he would be misinterpreting the statute, which requires students, not schools, to be under the direction of recognized churches (A. 70).

Petitioner's entitlement to a IV-D classification is, therefore, indisputable. That petitioner did not request the classification is of no consequence. Unlike the language in Section 456(h)(1) of the Act and 32 C.F.R. 1622.25, providing for student deferments, which requires the registrant to request the classification, the language of the ministerial exemption is mandatory; one who qualifies "*shall* be exempt from training and service." Section 456(g) (emphasis added). See *Oestereich* v. *Selective Service System Local Board No. 11,* 393 U.S. 233 (1968). See also, *United States* v. *Wachtel,* 311 F. Supp. 804 (N.D. Cal. 1969); *Turley* v. *Selective Service System Local Board No. 134,* 301 F. Supp. 845 (C.D. Cal., 1969). This view of the exemption was adopted by the court in *Kimball* v. *Selective Service System Local Board No. 15,* 293 F. Supp. 266, 267 (S.D.N.Y. 1968), which assumed that the exemption had to be granted even though not requested.

> "Although [plaintiff] Jack is now a full-time divinity student, he has not sought to be reclassified IV-D. . . . Because Jack was not present at the hearing of this motion and because defendants did not produce his file, it is not clear whether, before this motion, his draft board was aware of his entitlement to a clear statutory exemption from military service. 50 U.S.C. App.

§ 456(g). . . . Petitioner here has, before induction, made known his entitlement to exemption. . . . This exemption is mandatory, not permissive. See 50 U.S.C. App. § 456(g); 32 C.F.R. 1622.43(a)."

As in *Kimball*, petitioner, although not requesting an exemption, made known to the government that he qualified for it. In fact, it was the uncontradicted testimony at trial that petitioner advised the government on at least four separate occasions of his attendance or prospective attendance at divinity school: (1) in the Classification Questionnaire (SSS Form 100) completed soon after registering for the draft; (2) in his letter to President Johnson, which was later forwarded to his local board; (3) when interrogated by FBI agents; and (4) in testimony before the grand jury and the same Assistant United States Attorney who later conducted the prosecution of petitioner.

The import of these events is apparent. From the time of petitioner's first Classification Questionnaire in 1961, up to and including the time the local board classified him I-A in September 1967, ordered him to report for a physical in October and ordered him to report for induction in January 1968, it had substantial information to suggest that petitioner was entitled to a IV-D classification.

The majority below claimed, however, that petitioner did not submit sufficient proof of his entitlement to the IV-D classification, that there was a "basis in fact" for denying petitioner the exemption in that he failed to provide evidence that he was studying "under the direction of" his church (A. 69).[14] But the procedure directed by

[14] Since the dissent below did not even discuss this issue, the government is correct, albeit somewhat disingenuous, in observing in its Brief in Opposition (p. 10, n. 6) that the dissent "did not disagree with the majority on this issue."

Selective Service National Headquarters in Local Board Memorandum No. 56 places this burden on the Local Board. In order to substantiate claims for ministerial exemptions, a local board "must require" the registrant to furnish evidence that:

> "(1) He is a student preparing for the ministry under the direction of a recognized church or religious organization; and
>
> (2) He is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school . . ."

Furthermore, the Memorandum suggests that more "detailed information" may be solicited from the school. In addition:

> "If the local board considers the information it has received to be insufficient for the purpose of making a determination, it should request assistance or additional information from the State Director of Selective Service."

Thus, it was the obligation of the board, upon receiving information that petitioner may have been entitled to a IV-D classification, to solicit the additional information described in the Memorandum.[15] This obligation of a local board is analogous to its duty to send a registrant an application for conscientious objector status (SSS Form

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[15] It might be argued that the duty imposed on the board by Local Board Memorandum No. 56 was met by merely sending the Current Information Questionnaire (SSS Form 127) which petitioner declined to return. However, that form solicits no more information about attendance at divinity school than the board already had in its possession (Govt. Ex. 30, A. 52-53, especially "Series V.—Education"). In other words, that form would not have given the information required by Local Board Memorandum No. 56. In any case, petitioner's board, in compliance with the Memorandum, could have solicited the information directly from the school.

150) when the registrant informs the board that he is claiming conscientious objector status. The registrant need not formally request the Form 150. *United States* v. *Turner*, 421 F.2d 1251 (3rd Cir. 1970). The failure to give a registrant a requested Form 150 prior to the scheduled date of induction has been held to vitiate a failure to report for induction. *Boswell* v. *United States*, 390 F.2d 181 (9th Cir. 1968); *United States* v. *Stafford*, 389 F.2d 215 (2d Cir. 1968).

As for Assistant United States Attorney Robinson, he acquired personal knowledge in the grand jury room of petitioner's entitlement to a IV-D classification weeks before an induction order was mailed (A. 39). Nevertheless, he secured indictments some three months later with full knowledge that the board actions on which they depended were wholly unlawful.[16] Had petitioner been properly classified and thus exempt from service, it is unlikely that any of the counts of petitioner's indictment would have been brought.[17]

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[16] This would seem to do clear violence to the letter and spirit of the representation made to the Supreme Court by the Solicitor General in *Oestereich, supra.* In his Brief for the Respondents, arguing that review of the punitive reclassification of a divinity student could be had in a prosecution for induction refusal, the Solicitor General said:

> "... in view of the explicit exemption granted by Section 6(g), the Attorney General would not have started such a prosecution ..." (p. 64)

The Solicitor General goes on to say that if, as in this case, the Attorney General did proceed with a prosecution, "it would have been the clear duty of the court to have dismissed the prosecution on a showing that petitioner comes within the exempted class." (*Ibid.*)

[17] In an official publication of the Selective Service System, *Legal Aspects of Selective Service* (1969), the following statement appears:

> "Since the purpose of the law is to provide men for the military establishment rather than for the penitentiaries, it would seem

The information given to Robinson was effective notice of petitioner's eligibility for a IV-D even though not given directly to the board. It is not necessary, as the Second Circuit has recognized, that a claim for exemption be made directly to the board. *United States* v. *Holmes*, 426 F.2d 915 (2d Cir. 1970); *United States* v. *Stafford*, 389 F.2d 215 (2d Cir. 1968). This is in accordance with the position taken by Chief Judge Solomon in *United States* v. *Hanna Nickel Smelting Company*, 253 F. Supp. 784, 793 (D. Ore.), *aff'd* 400 F.2d 944 (9th Cir. 1968):

> "The Government, like a private corporation, acquires knowledge through its agents. Under well-established principles of agency, a principal is bound by the knowledge of its agents concerning a matter upon which it is the agent's duty to give the principal information. Restatement Agency 2d §272. It is no defense that the agent did not, in fact, communicate his knowledge to the principal."

In short, the Government "knew the facts" relevant to petitioner's eligibility for a IV-D classification. *United States* v. *Georgia-Pacific Company*, 421 F.2d 92, 97 n. 9 (9th Cir. 1970).

We need not consider the outer limits of this agency principle in all draft cases. Suffice it to say that in this case

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that when a registrant is willing to be inducted, he should not be prosecuted for minor offenses committed during his processing. The result of this procedure is that the great majority of prosecutions involve the failure to report for or refusal to submit to induction or assigned civilian work. . . . By agreement with the Department of Justice, registrants who turned in cards (as contrasted to those who burned cards) were not prosecuted under section 12(a) of the Military Selective Service Law of 1967, but were processed administratively by the local boards" (p. 47).

the information was not conveyed to some remote employee of the government in the Food and Drug Administration. Rather it was given to a Justice Department lawyer, intimately familiar not only with Selective Service law but with the young man against whom he ultimately sought indictments. There can be no denying that the government, before initiating these proceedings, knew that petitioner was in divinity school preparing for the ministry. That being the case, the statute's command is unequivocal: he *"shall"* be exempt.

The court below rejected this argument partly on exhaustion grounds. For reasons advanced in Point I, *supra,* we believe that doctrine inapplicable to petitioner's IV-D claim. Moreover, the judicial convenience which the rule typically serves—to spare courts the burden of hearing evidence more properly presented to the Selective Service System—can no longer be served here. The trial judge took substantial evidence regarding petitioner's entitlement to a ministerial exemption, without objection by the government (A. 20-22, 25). Inasmuch as the trial court, in its discretion, decided to consider the propriety of petitioner's classification, there was no "governmental interest compelling enough," *McKart* v. *United States,* 395 U.S. 185, 197 (1969), to justify the Second Circuit invoking the exhaustion rule.

In view of the mandatory language of the Act regarding divinity student exemptions, petitioner's I-A classification and order to report for induction were invalid, and the Court should reverse the conviction and enter a judgment of acquittal on Count One.

III.

The conviction for failure to report for a physical examination cannot stand because it was a direct result of petitioner's unlawful classification.

A. *Had Petitioner Been Classified I-O His Failure to Report for the Physical Examination Would Not Have Been Criminal.*

If the board had granted petitioner's application for conscientious objector status, he should have been placed in Class I-O, see Point I, *supra*. He then could have been lawfully called for a physical examination but his failure to report would not have been criminal. Local Board Memorandum No. 14 states Selective Service policy with regard to I-O registrants who fail to report for examination:

> "3. Action by Local Board Subsequent to Refusal of Its Own Registrants to Submit to Armed Forces Examination....
>
> (b) If the registrant is in Class I-O, consider him for all purposes as if he had been physically and mentally examined and found acceptable for military service and process him thereafter in the same manner as any other registrant in Class I-O who has been found acceptable for service after being given an armed forces physical examination.... "

This policy is implemented in the Order to Report Form (SSS Form 223, Govt. Ex. 33, A. 53-54) itself:

> "To Class I-O Registrants:
>
> This examination is given for the purpose of determining whether you are qualified for military

service. . . . If you fail to report for or submit to this examination, you will be subject to be ordered to perform civilian work in the same manner as if you had taken the examination and had been found qualified for military service."

The import of these policy statements is unmistakable: a registrant in Class I-O who fails to report for a physical examination has not refused "to perform any duty required of him" within the meaning of the Act. 50 App. U.S.C. §462(a). As a result, one court has said:

> "It is not disputed, and this court finds, that both classes of conscientious objectors—not only those who claim I-A-O status but also those who claim I-O status—are required under Selective Service procedures to be ordered by local draft boards to submit to physical examinations. 32 C.F.R. §1628.10. However, those conscientious objectors who are classified I-O and who nevertheless fail to report as ordered for a physical examination are not declared delinquent but, rather, are deemed to have met the requirement." *United States* v. *Walsh,* 279 F. Supp. 115, 118-19 (D. Mass. 1968).

To the same effect are the decisions in *Shoemaker* v. *United States,* 413 F.2d 274 (9th Cir. 1969), and *United States* v. *Mendoza,* 295 F. Supp. 673 (E.D.N.Y. 1969). Judge Feinberg, dissenting, agreed with petitioner's position on this point (A. 86-88), while the majority below affirmed petitioner's conviction on Count Two without even considering the validity of this argument (A. 78).

B. *Had Petitioner Been Classified IV-D, He Could Not Have Lawfully Been Ordered to Report for a Physical Examination.*

The registrants who may be ordered to report for a physical examination are strictly limited by the Selective Service regulations. 32 C.F.R. 1628.11 provides that:

> "(b) . . . the local board shall mail an Order to Report for Armed Forces Physical Examination (SSS Form 223) to registrants who have been classified in Class I-A, Class I-A-O, and Class I-O. . . .
>
> (c) The local board may also mail an Order . . . to any registrant who is classified in a class other than Class I-A, Class I-A-O, or Class I-O if it determines that his induction may occur shortly. . . ."

At the time petitioner was ordered to report for a physical examination on October 4, 1967, his board had information in its possession which should have compelled them to classify him IV-D. See Point II, *supra*. Had petitioner been so classified, he would not have been in a class which could lawfully have been ordered to report for a physical examination, §1628.11(b), nor would the board have had any basis to determine that his induction would occur shortly, §1628.11(c).

The board's unlawful failure to classify petitioner either I-O or IV-D thus excuses petitioner's failure to report for the physical examination, and the Court should reverse the conviction and enter a judgment of acquittal on Count Two.

IV.

Since petitioner was improperly classified I-A, he was not guilty of failing to possess a *valid* notice of classification.

When petitioner was classified I-A on September 19, 1967, he was mailed a Notice of Classification (SSS Form 110). In accordance with his determination to cease cooperating with Selective Service, he returned the unopened envelope to the board.

Petitioner was subsequently indicted for allegedly violating 32 C.F.R. 1623.5 which requires every registrant to "have in his personal possession at all times . . . a *valid* Notice of Classification (SSS Form 110) issued to him showing his current classification. . . ." (Emphasis added.)

But the September classification, for the reasons set forth in Points I and II, *supra,* was not lawful; petitioner should have been classified either IV-D or I-O. Notwithstanding the opinion of the majority below that it was unnecessary to consider this argument (A. 78), petitioner submits that the I-A Notice of Classification was not a valid one and his failure to possess it was not criminal.

Were it otherwise, it would defeat the functions of the possession requirement discussed in *United States* v. *O'Brien,* 391 U.S. 367 (1968). There this Court upheld the law prohibiting the burning of draft cards on the basis that they aided the smooth functioning of the Selective Service System. With regard to the classification certificate, the Court stated that it permitted the registrant to easily ". . . dispel a question as to whether he might be delinquent in his Selective Service obligations." *Id.* at 378.

Moreover, it provided the registrant with ". . . a rapid and uncomplicated means for determining his fitness for immediate induction . . . ," *id.* at 379, and assisted local boards other than the registrant's own in determining his proper classification. *Ibid.* Since none of these functions could be served by a card possessing an incorrect classification, it is clear that petitioner's failure to possess such a card cannot be considered a violation of 32 C.F.R. 1623.5.

One court has explicitly adopted this position. In *United States* v. *Hertlein,* 143 F. Supp. 742 (E.D. Wis. 1956), a case involving a registrant found to have been improperly reclassified from I-A-O to I-A, the court stated:

> "The defendant returned his Notice of Classification, issued July 14, 1953, to his local board. That card was the last classification of the defendant issued by the board and showed that the defendant had been classified I-A. As we previously stated in discussing Count II, the board was without jurisdiction to reclassify the defendant at that time. The I-A classification was invalid. As a result, the defendant had no duty to carry the classification card." *Id.* at 146.

Here the petitioner was not charged with returning his last valid classification card, his II-S card. He was convicted only for failing to possess the I-A card. That classification being invalid, the Court should reverse the conviction and enter a judgment of acquittal on Count Three.

V.

The conviction on Count Four cannot stand because petitioner substantially complied with the requirement that he submit the information requested by his board.

Count Four charged the petitioner with failing to submit the information requested in a Current Information Questionnaire (SSS Form 127) mailed to him in July 1967. It is important to note two things about this count of the indictment. First, it does *not* charge a failure to return the questionnaire, but rather a failure to give information. Second, it ascribes the failure to submit the information to the entire period from July 3, 1967 to the date of the filing of the indictment, namely, January 29, 1969.

A. *The Trial Judge Erroneously Charged the Jury on Count Four.*

It is apparent, therefore, that the petitioner could not be convicted on this count unless he knowingly failed to provide the information during that period, including the day he refused induction. Nevertheless, Judge Murphy charged:

> "In order to find the defendant knowingly violated the duty to submit a current information questionnaire to his local board, you must find that he was aware of this duty and that he deliberately refused to do so" (A. 41).[18]

[18] Although Judge Murphy first charged the jury that in order to convict petitioner on Count Four, they had to be satisfied beyond a reasonable doubt that " . . . he unlawfully and knowingly failed, neglected and refused to submit such information for which the local board had mailed him a request" (A. 41), Judge Murphy later defined the requisite intent in the language quoted in the text.

The instruction thus permitted a conviction for the failure to return the questionnaire alone without any determination by the jury of whether the information sought by the board was in fact in its possession at the time the questionnaire was mailed or was supplied before the bringing of the charges. "A conviction ought not to rest on an equivocal direction to the jury on a basic issue." *Bollenbach* v. *United States*, 326 U.S. 607, 613 (1946). The instruction here was so fundamentally prejudicial as to compel reversal and entry of a judgment of acquittal on this count.

Had the jury been properly instructed, they could reasonably have found that petitioner had supplied the requested information. Petitioner supplied his mailing address in the letter with which he returned the uncompleted questionnaire. He gave information concerning his enrollment at Union Theological Seminary to the F.B.I. agents in May 1967 and to the grand jury and assistant United States Attorney Robinson in November 1967. See Point II, *supra*. The rest of the information petitioner had given the board in a previous questionnaire (Govt. Ex. 4), and he again gave such information in the various forms filled out the day he refused induction (Govt. Ex. 37).

B. *Although Petitioner May Have Technically Violated a Regulation, the Statute Can Reasonably Require Only Substantial Compliance With Orders of the Local Board.*

In failing to return the questionnaire, petitioner undoubtedly violated a Selective Service regulation, 32 C.F.R. 1641.7(b), which requires a registrant to submit in writing all information requested by the board. Although that failure was technically a violation of the Act, §12(a), of the local board, the clear import of the Act and regulations is not to make such a violation criminal.

Count Four charged a failure to provide information and properly was not based on a technical violation of 32 C.F.R. 1641.7(b), even though it did cite that section as one of the authorizations for the count. In fact, it also cited 32 C.F.R. 1641.2(b), which says that a registrant waives any privilege which he does not claim within the required time. When read with 32 C.F.R. 1622.1(c), 1622.10 and 1623.1(b) which together say that a registrant will be placed in Class I-A unless he presents information within the required time justifying his being given another classification, the policy of the Selective Service System emerges clearly. The Act and the regulations place the burden on the registrant to prove his entitlement to a deferment or exemption. *Dickinson* v. *United States,* 346 U.S. 389 (1953). If he neglects to provide that information, he will then forfeit a possible deferment or exemption. See, e.g., *Boyd* v. *United States,* 269 F.2d 607, 611 (9th Cir. 1969) ("Furthermore, deferment is a privilege which may be waived or abandoned by the registrant's acts 'like any other personal privilege' "). However, it is hardly reasonable that Congress intended to make his neglect criminal as well, since the only resulting harm would be to the registrant and not to the system.

This was the reasoning of the court in *Norton* v. *United States,* 179 F.2d 527 (2d Cir. 1950), a case presenting a closely analogous situation. There a young man presented himself for registration, gave the information necessary for his registration, but refused to sign the registration card. In refusing to sign, he violated an explicit regulation —the violation of which was made a crime—which required him to "sign his name, exactly as he usually signs it. . . ." 32 C.F.R. 613.13(b) (now 32 C.F.R. 1613.13(b)). Never-

theless, the court, reading that section in conjunction with the following section, 613.13(c), authorizing the registrar to sign for a registrant who refuses, held:

> "The regulation having provided a substitute for the registrant's signature we believe that the substitute was meant to serve for all purposes, including the condoning of the refusal." *Id.* at 529.

Reading 32 C.F.R. 1641.7(b) with 32 C.F.R. 1641.2(b) and 32 C.F.R. 1622.1(c) suggests a similar resolution in this case. Just as the regulations provided an alternative when Norton refused to sign the registration card, the regulations provided an alternative here when the petitioner refused to return the questionnaire, namely waiver of any deferments and classification in class I-A. That alternative was just as clearly "meant to serve for all purposes, including the condoning of the refusal."

Only this approach to non-prejudicial violations of the regulations by registrants explains the failure to prosecute the many registrants who submit to the draft by deliberately failing to advise their boards of deferments available to them. It also accords with the well-recognized principle in Selective Service cases that violations of the regulations by a local board will invalidate an induction order only where there is some showing of prejudice to the registrant. See, e.g., *United States* v. *Lawson,* 337 F.2d 800 (3d Cir. 1964). Justice and good sense dictate that this be the rule where a registrant's violation of a regulation is only technical.

The statements of Selective Service officials and the reported decisions in fact suggest that this is the principle that has been followed. New York City Selective Service

Headquarters (Govt. Ex. 39, A. 58), did not recommend prosecution for petitioner's failure to return his Current Information Questionnaire. The reported cases of prosecutions for failing to provide information all involve attempts to benefit the registrant—and prejudice Selective Service—by either withholding or supplying incorrect information. Several cases involved a failure to furnish information about a registrant's employment that would have resulted in the loss of the registrant's occupational deferment. *United States* v. *Lembo,* 76 F. Supp. 209 (E.D. Pa.), *rev'd sub. nom. United States* v. *Aleli,* 170 F.2d 18 (3d Cir. 1948); *United States* v. *Weiss,* 65 F. Supp. 556 (E.D.N.Y.), *aff'd* 162 F.2d 447 (2d Cir. 1947), *cert. denied* 332 U.S. 767 (1947); *United States* v. *Wain,* 162 F.2d 60 (2d Cir. 1947); *Stassi* v. *United States,* 152 F.2d 581 (5th Cir. 1945), *cert. denied* 328 U.S. 442 (1946). The other cases involved a failure to keep the registrant's local board informed of the address where mail would reach the registrant. Again, these cases involved failure to furnish information which could have harmed the registrant. *United States* v. *Haug,* 150 F.2d 911 (2d Cir. 1945); *Stumpf* v. *Sanford,* 145 F.2d 271 (5th Cir. 1944); *Bartchy* v. *United States,* 132 F.2d 348 (5th Cir. 1942), reversed for lack of evidence, 319 U.S. 484 (1943). In both categories of cases, the failure to supply information prejudiced the boards' right to classify the registrant I-A.

Although there are no cases directly holding that the failure to provide information not prejudicial to the System is not criminal, the concurring opinion of Judges Learned Hand and Swan in *United States* v. *Rubinstein,* 166 F.2d 249 (2d Cir. 1948), seems to take this position. Cf. *Rich* v. *Hershey,* 303 F. Supp. 177, 181 (D. Colo.), *aff'd*

408 F.2d 944 (10th Cir. 1969). *Bartchy* v. *United States*, 319 U.S. 484 (1943), suggests that the requirement to advise the board of a mailing address is met by substantial compliance. See also, *Estep* v. *United States*, 327 U.S. 114, 145 (1946) (Frankfurter, J., concurring); *United States* v. *Ebey*, 424 F.2d 376 (10th Cir. 1970).

Applying this rule to the petitioner, his conviction cannot stand. All the information which he allegedly failed to provide—except for the mailing address, which he did provide—would have provided the basis for an exemption. Petitioner provided the information for exemption as a divinity student and conscientious objector. See Points I and II, *supra*. Any other deferments to which he may have been entitled had he submitted the requested information he waived, but petitioner committed no crime. Therefore, the Court should reverse the conviction and enter a judgment of acquittal on Count Four.

VI.

If this Court does not direct a judgment of acquittal on Counts Three and Four, the Court should reverse the convictions on Counts Three and Four and remand to the trial court so that the government may determine whether it wishes to press the prosecution on these counts.

Petitioner here received concurrent two-year sentences on four counts. This sentence was admittedly within the trial judge's authority. However, as Judge Feinberg noted, if petitioner had been properly classified I-O or IV-D in September 1967 by his local board, the alleged violation leading to indictment on Count Two would never have occurred and the prosecutions on Counts Three and Four may never have been brought (A. 88-89). Indeed, the Selective Service authorities did not even recommend prosecution on Count Four (Govt. Ex. 39, A. 58-59).

Moreover, Judge Feinberg questioned whether the trial judge or jury would have reached the same results if they had been asked to try a registrant possessing divinity student or conscientious objector status on Counts Three and Four. He also questioned whether the judge, assuming he realized that petitioner should have been classified I-O or IV-D, would have rendered a shorter sentence or possibly probation if petitioner had only been found guilty on Counts Three and Four (A. 89).

If this Court does not reverse the convictions and direct a judgment of acquittal on Counts Three and Four, the Court should reverse the convictions on Counts Three and Four and remand to the trial court so that the government may determine whether it wishes to press the

prosecution on these counts. Petitioner submits that this would be "such appropriate judgment . . . as may be just under the circumstances." 28 U.S.C. §2106; *Bryan* v. *United States,* 338 U.S. 552, 558 (1950).

CONCLUSION

For the reasons stated above, the Court should reverse the judgment below and enter a judgment of acquittal on all four counts of the indictment.

Respectfully submitted,

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